No. 93-523

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In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Fifth Amendment privilege against compelled self-incrimination justified petitioner's refusal to comply with a subpoena requiring the production of his personal calendar.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A28) is reported at 1 F.3d 87. The opinion of the district court (Pet. App. A1-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1993. A petition for rehearing was denied on August 27, 1993. Pet. App. A29. The petition for a writ of certiorari was filed on October 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 29, 1992, a federal grand jury in the Southern District of New York issued a subpoena requiring petitioner to produce his personal calendar for 1988. After petitioner refused to comply with the subpoena, the government moved to compel production of the subpoenaed document. The district court denied the government's motion. Pet. App. A1-A6. The court of appeals reversed. *Id.* at A7-A28.

1. In 1989, as part of an investigation of insider trading involving petitioner and others, the Securities and Exchange Commission (SEC) served petitioner with a subpoena requiring him to produce various documents, including his personal calendar for 1988. Petitioner used the calendar to record appointments, social engagements, chores, telephone numbers, and other reminders. Pet. App. A9. After initially resisting the subpoena, petitioner agreed to supply the requested documents. In return, the SEC agreed to withdraw the subpoena. *Ibid.*

On December 20, 1990, the SEC requested that petitioner produce any "[d]esk calendars, diaries and appointment books kept by him or on his behalf." On January 28, 1991, petitioner complied with that request by producing a number of documents, including a photocopy of his 1988 calendar. Petitioner submitted a letter with those documents "claim[ing] that all materials provided to the Staff during the course of this investigation, including this letter and the documents transmitted herewith, are entitled to confidential treatment." In addition, every page of the documents produced by petitioner bore a stamp stating that the document was "provided to the [SEC] solely for its use, and neither the document nor its contents

may be disclosed to any other person or entity." Pet. App. A2, A9-A10.

While the SEC's investigation was pending, the United States Attorney's Office for the Southern District of New York sought access to the documents produced to the SEC by petitioner. On March 5, 1991, the SEC provided prosecutors with a copy of petitioner's 1988 calendar. From the photocopy of the calendar, it appeared that entries on the original of the calendar may have been "whited out." Pet. App. A10-A11.

On October 29, 1990, a grand jury that had been investigating possible perjury and obstruction of justice charges against petitioner and others issued a subpoena requiring petitioner to produce the original of the calendar. Petitioner informed the government that, based on his Fifth Amendment privilege against compelled self-incrimination, he would refuse to comply with the subpoena. The government then moved to compel compliance with the subpoena. At a hearing before the district court, petitioner reasserted his Fifth Amendment claim. He also asserted that the SEC had breached a confidentiality agreement with him by providing a copy of the calendar to the United States Attorney's Office. Pet. App. A11.

The district court granted petitioner's motion to quash the grand jury subpoena, stating:

> The diary is an intimate personal document; the content of the original document as originally written or revised was not published to anyone; the disclosure of a purported copy to the SEC was not a publication of the original; the original document was not voluntarily disclosed to the SEC or to the Assistant United States Attorney. The original document is subject to the privilege

> of the Fifth Amendment in its original and in its present altered (if it was) form.

Pet. App. A4, A11-A12.

2. The court of appeals reversed. Pet. App. A7-A28. It rejected petitioner's contention that statements in *Boyd* v. *United States*, 116 U.S. 616 (1886), authorized petitioner to invoke the Fifth Amendment in refusing to produce his personal calendar. The court acknowledged (Pet. App. A13-A14) that in *Boyd* this Court stated that "a compulsory production of the private books and papers of the owner of goods sought to be forfeited, * * * is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution." 116 U.S. at 634-635. The court of appeals concluded, however, that *Boyd*'s statement that the Fifth Amendment protected against the compelled production of private papers was no longer good law in light of the Court's decisions in *Fisher* v. *United States*, 425 U.S. 391 (1976); *Andresen* v. *Maryland*, 427 U.S. 463 (1976); *United States* v. *Doe*, 465 U.S. 605 (1984); and *Baltimore City Dep't of Social Services* v. *Bouknight*, 493 U.S. 549 (1990).

Although the court of appeals recognized that none of those decisions directly considered the production of "private books and papers," it noted that in *Fisher*, the Court observed that *Boyd*'s approach to private papers was inconsistent with the limitation of the Fifth Amendment privilege to compelled "testimony" that is self-incriminating. Pet. App. A16. In addition, the court of appeals noted that *Fisher*, *Doe*, and *Bouknight* had established that the Fifth Amendment applies only to the testimonial aspect of the act of producing a document in response to a government

demand, and that the preparation of the document does not fall within the privilege if the person asserting the privilege voluntarily created the document.[1] Based on that analysis, the court of appeals concluded that, because petitioner had voluntarily prepared the calendar commanded by a subpoena, he could not rely on the Fifth Amendment to resist its production.[2] Pet. App. A20.

Judge Altimari dissented. He argued that because this Court has never expressly overruled its pronouncement in *Boyd* that the Fifth Amendment privilege protects against the compelled production of "private books and papers," the court of appeals was not free to reach a result inconsistent with *Boyd*. Pet. App. A25-A28.

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[1] In response to petitioner's argument that *Boyd* should control this case because this Court has not explicitly overruled it in all respects, the court of appeals noted that *Boyd* itself "concerned business documents, and therefore its declarations regarding the Fifth Amendment's protection of non-business documents were dicta." Pet. App. A19.

[2] The court of appeals also rejected petitioner's claims, which he does not renew in this Court, that he could resist production of the calendar because the act of production itself was incriminatory and because the SEC engaged in misconduct in turning a photocopy of the calendar over to the United States Attorney's office. Pet. App. A20-A24.

ARGUMENT

The court of appeals correctly concluded that the Fifth Amendment does not protect the contents of the personal calendar subpoenaed from petitioner. Because other courts of appeals have reached conflicting results, however, and because the issue is a recurring one, we believe that this Court's review is appropriate.

1. Petitioner contends (Pet. 5-18) that the Fifth Amendment privilege against compelled self-incrimination justifies his refusal to produce his personal calendar in response to a subpoena. The court of appeals correctly concluded, however, that this Court's statement in *Boyd* that the full protection of the Fifth Amendment extends to the contents of "private books and papers" is no longer an accurate statement of the law.

This Court's recent cases establish that the Fifth Amendment protects only compulsory testimonial communications and not the contents of subpoenaed documents that were voluntarily created. In *Fisher* v. *United States*, *supra*, this Court observed that several aspects of *Boyd* "have not stood the test of time," 425 U.S. at 407, that the Fourth Amendment foundations of the Fifth Amendment doctrine articulated in *Boyd* "have been washed away," 425 U.S. at 409, and thus that *Boyd*'s approach to private papers "has long been a rule searching for a rationale." *Ibid.* Although the Court ultimately concluded that it need not resolve the status under the Fifth Amendment of "private papers," for none were at issue in that case, *id.* at 414, it stated broadly that the Fifth Amendment privilege "applies only when the accused is compelled to make a testimonial communication that is incriminating" and that a witness "cannot avoid compliance

with [a] subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else." *Id.* at 408, 410.

In *Andresen* v. *Maryland*, *supra*, the Court held that the Fifth Amendment does not bar the introduction into evidence of a person's business records, seized during a search of his office. The Court stated that the contents of records "voluntarily committed to writing" are not privileged; only the act of producing such documents is compelled and therefore potentially privileged. 427 U.S. at 473-477. The Court reiterated *Fisher*'s recognition that "the continued validity of the broad statements contained in some of the Court's earlier cases had been discredited by later opinions." 427 U.S. at 472.

In *United States* v. *Doe*, *supra*, this Court again refused to apply *Boyd* to protect the contents of business records that were voluntarily prepared. In that case, the Court held that the Fifth Amendment does not protect the business records of a sole proprietorship. 465 U.S. at 610-612. The Court explained that "[i]f the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged." 465 U.S. at 612 n.10. The Court again noted that, contrary to "language in *Boyd* v. *United States*," the Court has never applied the Fifth Amendment to prevent the acquisition of evidence that "did not involve compelled testimonial self-incrimination of some sort." *Id.* at 610 n.8, quoting *Fisher*, 425 U.S. at 399.[3]

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[3] Justice O'Connor wrote a concurring opinion in *Doe* to make clear her belief "that the Fifth Amendment provides

Finally, in *Baltimore City Dep't of Social Services* v. *Bouknight*, *supra*, the Court stated that "a person may not claim the [Fifth] Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded." 493 U.S. at 555. The Court accordingly rejected a claim that compliance with a juvenile court's order requiring a parent to produce her child or reveal his whereabouts in connection with a protective custody case would violate the Fifth Amendment.

Under those decisions, the court of appeals correctly determined that a witness may not refuse to produce a document based on the personal nature of the contents of the document. *Boyd*'s statements regarding the protection according to private papers under the Fifth Amendment, which were themselves dicta, see *Andresen* v. *Maryland*, 427 U.S. at 471; note 1, *supra*, have not survived the reasoning of later cases.[4]

2. The court of appeals' decision is consistent with the decisions of three other courts of appeals. See *United States* v. *Wujkowski*, 929 F.2d 981, 985 (1991), aff'd after remand *sub nom. United States* v. *Stone*, 976 F.2d 909 (4th Cir. 1992) (per curiam),

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absolutely no protection for the contents of private papers of any kind." *Doe*, 465 U.S. at 618.

[4] Petitioner also asserts (Pet. 13-17) that the protection accorded "private books and papers" in *Boyd* serves to safeguard important privacy interests. The Court rejected that argument in *Fisher*, 425 U.S. at 399, 401, indicating that privacy interests that do not involve "compelled testimonial self-incrimination" cannot find shelter under the Fifth Amendment. See also *United States* v. *Doe*, 465 U.S. at 610 n.8. Because petitioner's entries into his personal calendar were not compelled, he may not resist production of the calendar under the Fifth Amendment.

cert. denied, 113 S. Ct. 1843 (1993); *In re Sealed Case*, 877 F.2d 83, 84 (D.C. Cir. 1989), cert. denied, 493 U.S. 1044 (1990); *In re Grand Jury Proceedings*, 759 F.2d 1418, 1419-1420 (9th Cir. 1985).

As petitioner notes (Pet. 11 & n.6), however, cases from two courts of appeals conflict with the decision of the court of appeals in this case. In *United States* v. *Davis*, 636 F.2d 1028 (5th Cir.), cert. denied, 454 U.S. 862 (1981), the court of appeals held that "any incriminating papers in the actual or constructive possession of an individual, which he holds in his individual capacity, rather than in a representative capacity, and which he himself wrote or which were written under his immediate supervision, are absolutely protected by the *Boyd* principle from production by subpoena or equivalent process, regardless of whether they are business-related or more inherently personal in content." 636 F.2d at 1043 (footnotes omitted).[5] In *In re Grand Jury Proceedings*, 632 F.2d 1033, 1042-1044 (3d Cir. 1980), the court of appeals concluded that the government could not "compel production of the pocket date books of [an individual], without violating his guarantees under the fifth amendment." *Id.* at 1044. In both of those cases, the courts declined to hold that the "private papers" principle of *Boyd* did not survive later decisions of this Court.

Both of those decisions predate this Court's more recent decisions in *Doe* and *Bouknight*, which have removed any remaining question about *Boyd*'s lack of vitality, and it is possible that the Third and Fifth Circuits would reconsider their views if the issue

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[5] *United States* v. *Miller*, 660 F.2d 563, 567 (5th Cir. 1981), followed *Davis*, but was later vacated as moot, 685 F.2d 123 (5th Cir. 1982).

were again presented. Nevertheless, the issue of whether *Boyd* protects particular documents is a recurring one that arises with some frequency. Several courts of appeals have reserved decision on the impact of later Supreme Court cases on *Boyd*'s statements regarding private papers.[6] Many decisions in the trial courts regarding the scope of subpoenas may well be influenced by the uncertainty concerning *Boyd* and it is not always efficient or practical to take an appeal. A decision of this Court that finally resolves the validity of *Boyd* would add useful clarity to this area of the law.[7] Accordingly, we believe that the Court should grant review in this case.

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[6] Pet. 11 n.7; see *In re Grand Jury Investigation*, 921 F.2d 1184, 1187 n.6 (11th Cir. 1991) (declining to reach the issue in large part because the government had not "press[ed] this point" and ruling in any event that trust account records were required to be produced); *United States* v. *Mason*, 869 F.2d 414, 416 (8th Cir.) (authorizing the compelled production of pocket calendars quite similar to the calendar subpoenaed from petitioner), cert. denied, 492 U.S. 907 (1989); *In re Steinberg*, 837 F.2d 527, 528-530 (1st Cir. 1988) (concluding that if *Boyd* ever applies, its reach is limited to extraordinarily private documents and does not cover the chronological notebooks of security personnel at issue there); *Butcher* v. *Bailey*, 753 F.2d 465, 469 (6th Cir.) (requiring production of personal records relating to a bankruptcy estate and noting that if *Boyd* ever applies, its production would be sharply limited), cert. dismissed, 473 U.S. 925 (1985). While those decisions do not assist petitioner, they do illustrate the continuing questions that have been raised about *Boyd*.

[7] To resolve a similar issue, the government filed a petition for a writ of certiorari in *United States* v. *John Doe No. 462*, No. 84-823, which presented the question whether the Fifth Amendment privilege against compelled self-incrimination protects the contents of an individual's voluntarily prepared financial records. In that case, the court of appeals had held,

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

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"in line with *Boyd*, that the fifth amendment prevents the government from subpoenaing an individual's incriminating papers that are in his possession and are held by him in an individual, as opposed to representative capacity." *United States* v. *John Doe No. 462*, 745 F.2d 834, 840 (4th Cir. 1984). The Court granted the petition, 469 U.S. 1188 (1985), but subsequently vacated the judgment and remanded with instructions to dismiss the case as moot. 471 U.S. 1001 (1985), on remand, *United States* v. *John Doe No. 462*, 763 F.2d 662 (4th Cir. 1985) (per curiam).

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